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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

RAFFI NAKASHIAN, a/k/a "Ralfi,"

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTION PRESENTED

Whether, in examining specific and general conspiracy counts in an indictment to determine if they are multiplicitous, and therefore in violation of the Double Jeopardy Clause of the fifth amendment, the appropriate inquiry is limited to a comparison of the statutory elements, with no consideration given to the factual allegations in the indictment.

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IN THE

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RAFFI NAKASHIAN, a/k/a "Ralfi,"

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Raffi Nakashian, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on June 2, 1987.

## OPINION BELOW

The opinion of the court of appeals is reported at 820 F.2d 549 (2d Cir. 1987) and also appears in the Appendix hereto. The opinion of the district court, granting in part Mr. Nakashian's motion to dismiss the indictment, is reported at 635 F. Supp. 761 (S.D.N.Y. 1986), and also appears in the Appendix hereto.

## JURISDICTION

The judgment of the court of appeals was entered on June 2, 1987. A timely Petition for Rehearing With Suggestion for Rehearing *In Banc* was denied on July 21, 1987, and this Petition for Writ of Certiorari is timely filed, pursuant to Rule 20 of the Rules of this Court, within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The general conspiracy statute, 18 U.S.C. § 371, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The conspiracy statute regarding the distribution of controlled substances, 21 U.S.C. § 846, provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The conspiracy statute regarding the importation of controlled substances, 21 U.S.C. § 963, provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

## STATEMENT OF THE CASE

The question presented herein concerns the three conspiracy counts of the indictment (Counts One, Two and Three). The factual allegations underlying all three conspiracy counts are identical, and the same conspiracy is referred to in each of those three counts. The conspiracy counts charge, in essence, that Mr. Nakashian was a money courier who made a false customs declaration, allegedly as part of a single complex conspiracy to import and distribute hashish in the United States and to export the sale proceeds.

The indictment charges Mr. Nakashian with conspiracy to import hashish into the United States, in violation of 21 U.S.C. § 963 (Count One), and conspiracy to distribute hashish, in violation of 21 U.S.C. § 846 (Count Two).[1] In addition to these specific conspiracy charges, the government has fashioned a third conspiracy charge pursuant to the general conspiracy statute. The government charges Mr. Nakashian with conspiracy to transfer outside the United States money from the importation and distribution of hashish, in violation of 18 U.S.C. § 371 (Count

[1] Counts One and Two are hereinafter referred to as "the specific conspiracies."

Three).[2] The government's basis for federal jurisdiction in the United States District Court was pursuant to 18 U.S.C. § 3231.

As previously indicated, the factual allegations underlying each conspiracy count are identical. All three conspiracy counts allege: (1) the identical overt acts; (2) the same conspiratorial agreement; (3) the same underlying course of conduct; and (4) the same object of the conspiracy. In addition, it is the same conduct by Mr. Nakashian—as a money courier who made a false customs declaration—that is alleged in each conspiracy count.

Based on the foregoing, Mr. Nakashian moved to dismiss the conspiracy counts in the indictment, on the ground that they are multiplicitous. The district court properly found, by order dated May 28, 1986, that the specific conspiracy counts, on the one hand, and the general conspiracy count, on the other hand, are multiplicitous, and therefore in violation of the Double Jeopardy Clause of the fifth amendment. As a remedy, the district court ordered the government to elect between the specific conspiracy counts and the general conspiracy count. On June 10, 1986, the government moved the district court for reconsideration of its order. By order dated June 30, 1986, the district court denied the government's motion.

On June 2, 1987, on appeal by the government, a panel of the court of appeals reversed the order of the district court. On June 16, 1987, Mr. Nakashian filed with the court of appeals a petition for rehearing with suggestion for rehearing *in banc*. The court of appeals denied the petition on July 21, 1987. A copy of the order denying the petition for rehearing appears in the Appendix hereto.

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[2] Count Three is hereinafter referred to as "the general conspiracy." The indictment also contains five counts charging perjury before a grand jury, in violation of 18 U.S.C. § 1623. Those counts are not at issue in this petition.

In reaching its decision that the conspiracy counts in the indictment are multiplicitous, the district court properly applied the three-part inquiry set forth in *United States* v. *Marrale*, 695 F.2d 658, 662 (2d Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983) (hereinafter "the *Marrale* test").[3] In applying the *Marrale* test, the district court correctly found that the specific and general conspiracy counts in this case fail the second step of that test. Step two of the *Marrale* test asks, "whether the two offenses are *sufficiently distinguishable* from one another that the inference that Congress intended to authorize multiple punishments is a reasonable one." *United States* v. *Marrale*, 695 F.2d at 662 (emphasis added).

In determining whether the specific and general conspiracy charges are "sufficiently distinguishable," the district court first applied the test set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) (hereinafter "the *Blockburger* test").[4] The district court did not, how-

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[3] The *Marrale* test asks:

(1) whether each statutory provision allegedly violated unambiguously authorizes punishment for a violation of its terms;

(2) whether the offenses charged are sufficiently distinguishable from one another to permit a reasonable inference that Congress intended to authorize multiple punishments; and

(3) if the first two questions are answered affirmatively, whether the legislative history reveals a congressional intention against multiple punishments.

*United States* v. *Marrale*, 695 F.2d at 662. The first and third parts of the *Marrale* test are not at issue in this petition.

[4] The *Blockburger* test merely asks "whether each provision [or statute] requires proof of a fact which the other does not." 284 U.S. at 304. The issue in *Blockburger* was whether a single sale of narcotics could violate two different sections of a statute regulating such sales. Thus, the *Blockburger* opinion did not involve multiplicity problems that arise when multiple conspiracies are charged.

ever, limit its inquiry merely to a wooden application of the *Blockburger* test. Instead, recognizing the special multiplicity concerns which necessarily arise when an indictment, as here, alleges both specific and general conspiracies, the district court looked "beyond the statutory elements to the specific allegations and objectives of each conspiracy alleged." (A. 42).[5] In doing so, the district court found that the specific conspiracy charges are not sufficiently distinguishable from the general conspiracy charge, and therefore the indictment is multiplicitous. In short, the district court found that Mr. Nakashian was being charged twice for the same offense.[6]

The court of appeals reversed the district court's order, holding that the *Blockburger* inquiry is the "only test to be used" in determining whether conspiracy charges are sufficiently distinguishable. (A. 7). In limiting step two of the *Marrale* test to this superficial examination of the statutory elements, the court of appeals' decision effectively precludes any challenge on multiplicity grounds to an indictment containing both general and specific conspiracy counts.

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[5] "A.—" refers to the Appendix hereto. The relevant portion of the district court's decision appears in the Appendix at pages A. 31-48.

[6] As explained later in this petition, no multiplicity problem arises as to the charges of conspiracy to import drugs in Count One and conspiracy to distribute drugs in Count Two, because of the specificity of the statutes involved. *See Albernaz* v. *United States*, 450 U.S. 333 (1981). The multiplicity problem arises only when the government charges someone under both the specific and the general conspiracy statutes. In such instances, the multiplicity problem arises because of the government's unfettered ability to fashion the general conspiracy count to create an offense identical in substance to that set forth in the specific conspiracy count, even though the general conspiracy count may be drafted to appear as a separate and distinct offense.

## REASONS FOR GRANTING THE PETITION

This petition concerns an exceptionally important, discrete issue arising under the Double Jeopardy Clause of the fifth amendment of the United States Constitution. The decision of the court of appeals effectively precludes any challenge on multiplicity grounds to an indictment containing both specific and general conspiracy counts. As a result, the government may now, with unbridled discretion, use the general conspiracy statute, together with a specific conspiracy statute, to charge a defendant twice for the same offense. This result runs directly afoul of the Double Jeopardy Clause of the fifth amendment. In addition, the decision below further widens a conflict that presently exists among the circuits that have addressed the question presented herein.

More specifically, it is respectfully submitted that this Court should now review the question presented herein for the following reasons.

### I.

### The Decision Of The Court Of Appeals Effectively Precludes Any Challenge On Multiplicity Grounds To An Indictment Containing Both Specific And General Conspiracy Charges.

In its decision, the court of appeals in this case held that, to determine whether specific and general conspiracy counts charged in the same indictment are "sufficiently distinguishable" under step two of the *Marrale* test, only the statutory elements of the conspiracy charges should be examined (the *Blockburger* test). The court of appeals' decision thus indicates that courts should simply ignore the special multiplicity concerns that necessarily arise

when a defendant is charged with both general and specific conspiracy offenses, even where, as in this case, the underlying factual allegations of each conspiracy are identical. Moreover, since specific and general conspiracies, by definition, have different statutory elements, a multiplicity problem will never arise upon a review limited to the statutory elements. Therefore, the decision below effectively precludes any challenge on multiplicity grounds to an indictment containing both specific and general conspiracy charges.

When only violations of specific conspiracy statutes are alleged in an indictment, multiplicity problems may not necessarily arise. By definition, specific conspiracy statutes proscribe certain specific, narrowly-defined conduct. Each specific conspiracy statute proscribes a different course of conduct. As a result, it is difficult for a defendant to argue that he has been charged twice for the same crime. *See Albernaz* v. *United States, supra,* 450 U.S. 333.

On the other hand, when charges are brought under both the general and specific conspiracy statutes as in this case, there is a very real danger that the defendant is being charged twice for the same offense. Unlike specific conspiracy statutes, the general conspiracy statute does not proscribe any specific type of conduct. Instead, the general conspiracy statute accords the government enormous latitude to fashion the particular offense. As a result, when the government charges a defendant under the general conspiracy statute, as well as under specific conspiracy statutes, the indictment may in fact be multiplicitous, even though the government has drafted the conspiracy counts so that they appear to be charging separate offenses.[7]

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[7] In *United States* v. *Abbamonte*, 759 F.2d 1065, 1068 (2d Cir. 1985), the court recognized "the ease with which prosecutors can draft indictments that allege what appear to be separate conspiracies but may actually be parts of an overall conspiracy. . . ."

If, as the decision below holds, the *Blockburger* inquiry (comparing only the statutory elements) is the only test under the second step of the *Marrale* formulation, then specific and general conspiracy charges in the same indictment could *never* be found to be multiplicitous. The only issue under *Blockburger* is, essentially, whether charges have been brought under two separate statutes, which is true whenever both specific and general conspiracies are alleged.[8] By limiting the step two inquiry merely to an examination of the statutory elements—and ignoring the factual allegations underlying the conspiracy counts—the decision of the court of appeals in this case allows the government to fashion identical conspiracy offenses under both the general conspiracy statute and a specific conspiracy statute, free from any challenge on multiplicity grounds.

The government may now, with impunity, charge a defendant twice for the same offense: once under a specific conspiracy statute, and a second time under the guise of the general conspiracy statute. That is precisely what the government has done in this case.

Accordingly, it is respectfully submitted that the Court should grant this petition and review whether, as the decision below effectively holds, indictments alleging both specific and general conspiracy offenses are never subject to challenge on multiplicity grounds.

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[8] As previously stated, the *Blockburger* decision did not involve multiplicity problems that arise when multiple conspiracies are alleged. Nor, of course, could that decision have contemplated the special multiplicity concerns that arise when a general conspiracy charge is coupled with specific conspiracy charges.

## II.

**There Is A Conflict Among The Circuits That Have Addressed The Important Constitutional Question Presented In This Petition.**

The decision of the court of appeals in this case contributes to an already existing conflict among the circuits that have addressed the issue presented in this petition. It is respectfully submitted that the Court should take this opportunity to resolve the conflict among the circuits, especially since the question presented involves an important constitutional right.

In *United States* v. *Corral*, 578 F.2d 570 (5th Cir. 1978), and *United States* v. *Mori*, 444 F.2d 240 (5th Cir.), *cert. denied*, 404 U.S. 913 (1971), the Fifth Circuit squarely decided the question presented in this petition. In those cases, as in the instant case, the defendants were charged under both the general conspiracy statute and the specific drug conspiracy statutes. In each of those cases, the Fifth Circuit found that the defendant could not be charged under both the general and the specific conspiracy statutes, because the factual allegations underlying each conspiracy charge showed that the indictment did not in fact allege two separate conspiracy offenses. In reaching its decision, the Fifth Circuit did not limit its inquiry to the statutory elements of each alleged conspiracy offense. Instead, the court looked beyond the statutory elements to the factual allegations underlying each offense. In *Mori*, the Fifth Circuit further noted that "the . . . fact that this single agreement theoretically violated the general conspiracy statute as well as the more specific narcotics conspiracy statute . . . is irrelevant." *United States* v. *Mori*, 444 F.2d at 244-45.

In contrast, the Tenth Circuit in *Timberlake* v. *United States*, 767 F.2d 1479 (10th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 882 (1986), and the Second Circuit in this case, have held that only the mechanical *Blockburger* test should be employed in determining whether general and specific conspiracy counts in an indictment are multiplicitous. In doing so, the inquiry undertaken by the Tenth and Second Circuits in those cases is limited only to an examination of the statutory elements of each alleged offense. The factual allegations underlying each of the conspiracy charges, on the other hand, are simply ignored. Thus, since the statutory elements of a specific conspiracy statute are always different from those of the general conspiracy statute, an indictment charging offenses under both statutes can never be challenged on multiplicity grounds. The unnecessarily superficial inquiry adopted by these circuits creates a very real danger that a defendant will be charged twice for the same conspiracy offense.[9]

In sum, there is a very clear conflict among the three circuits that have addressed the question presented in this petition.[10] Accordingly, it is respectfully submitted that the

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[9] The conflict among the circuits is further illustrated by the vigorous opinion in *Timberlake* dissenting from the majority's strict adherence to the *Blockburger* test. *Timberlake* v. *United States*, 767 F.2d at 1482 (McKay, J., concurring in part and dissenting in part). That opinion clearly contrasts the analysis of the Fifth Circuit with that of the Tenth and Second Circuits.

[10] Not only is there a conflict among the three circuits, but there is also a conflict within the Second Circuit itself. The decision below conflicts with an earlier Second Circuit decision in *United States* v. *Barton*, 647 F.2d 224 (2d Cir. 1981). In *Barton*, the Second Circuit clearly looked beyond the statutory elements to the underlying factual allegations, in determining whether the specific and general conspiracy counts in the indictment are multiplicitous. This was confirmed by Judge Newman, a member of the *Barton* panel, in a subsequent case. *United States* v. *Thomas*, 757 F.2d 1359, 1374 (2d Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 66 (1985) (Newman, J., concurring in part and

*(footnote continued on following page)*

Court should take this opportunity to resolve the conflict among the circuits, especially since this unsettled question of law involves an important constitutional right arising under the Double Jeopardy Clause of the fifth amendment.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be issued.

Dated: September 18, 1987

Respectfully submitted,

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*(footnote continued from previous page)*

dissenting in part). In that case, Judge Newman expressly stated that the *Barton* panel examined the underlying factual allegations of each conspiracy count. Judge Newman further stated that, "the Supreme Court has specifically recognized that, where a statutory offense that can be committed in a variety of ways [as with the general conspiracy statute in this case] is claimed to be the same as some other offense, the *Blockburger* test cannot be applied only by analyzing the statutory elements but requires further consideration of the precise allegations." *United States* v. *Thomas*, 757 F.2d at 1373 (*construing Brown* v. *Ohio*, 432 U.S. 161 (1977) and *In re Nielsen*, 131 U.S. 176 (1889)).

## CERTIFICATE OF SERVICE

This is to certify that on the 18th day of September, 1987, three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit were served by mail on the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ KENNETH V. HANDAL

KENNETH V. HANDAL

# APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 264—August Term, 1986

(Argued: October 14, 1986 Decided: June 2, 1987)

Docket No. 86-1310

UNITED STATES OF AMERICA,

*Appellant,*

— v. —

RAFFI NAKASHIAN, a/k/a "Ralfi,"

*Defendant-Appellee.*

Before:

FEINBERG, *Chief Judge,* WINTER and MAHONEY,

*Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Louis L.

Stanton, *Judge*, requiring the government to elect between two counts charging conspiracy to import and distribute hashish and one count charging conspiracy to defraud and make false statements to the United States.

Reversed and remanded.

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Jess Fardella, Assistant United States Attorney (Bruce A. Green, Assistant United States Attorney, and Rudolph W. Giuliani, United States Attorney, Southern District of New York, of counsel), for *Appellant*.

Kenneth V. Handal, New York, New York (Michael D. Schissel, Marks Murase & White, New York, New York, of counsel), for Defendant-Appellee.

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MAHONEY, *Circuit Judge*:

The United States appeals, pursuant to 18 U.S.C. § 3731 (1982 & Supp. III 1985), from an order of the United States District Court for the Southern District of New York holding that the indictment brought against appellee is multiplicitous, and requiring the government to elect between the two counts charging conspiracy to import and distribute hashish and the count charging conspiracy to defraud and make false statements to the United States. Section 3731 allows an interlocutory appeal by the United States from an order "dismissing" a count of an indictment, and an order compelling an elec-

tion between counts is a "dismissal" for Section 3731 purposes. *See United States v. Margiotta*, 662 F.2d 131, 138-39 (2d Cir. 1981); *United States v. Margiotta*, 646 F.2d 729, 731-32 (2d Cir. 1981); *see also United States v. Tom*, 787 F.2d 65, 69-70 (2d Cir. 1986).

*BACKGROUND*

In Count One of the indictment, appellee was charged under 21 U.S.C. § 963 (1982) with conspiring to violate 21 U.S.C. §§ 812 (1982), 952(a) (1982 and Supp. III 1985), and 960(b)(2) (1982) by importing hashish into the United States.

In Count Two, appellee was charged under 21 U.S.C. § 846 (1982) with conspiring to violate 21 U.S.C. §§ 812 (1982), 841(a)(1) (1982), and 841(b)(6) (1982) (repealed effective October 12, 1984)[1] by distributing, and possessing with intent to distribute, hashish.

In Count Three, appellee was charged under 18 U.S.C. § 371 (1982) with conspiring (1) to defraud the United States by impeding the collection of information and reports concerning the movement of United States currency and transactions involving large amounts of cash, and the detection of crimes committed in relation thereto, and (2) to violate 18 U.S.C. § 1001 (1982) by making false statements, writings and entries concerning matters within the jurisdiction of a United States department or agency.[2]

Appellee's connection to the alleged conspiracies was

[1]Counts One and Two of the indictment charge conspiracies occurring from "in or about October, 1979 and continuously thereafter up to and including October 11, 1984."

[2]The indictment contains five additional counts charging perjury before a grand jury which are not at issue on this appeal.

that he allegedly (1) received in excess of six million dollars from an intermediary which constituted partial payment for twenty tons of hashish smuggled into the United States pursuant to the importation conspiracy, and (2) filed a Report of International Transportation of Currency or Monetary Instruments, United States Customs Form 4790, on or about September 29, 1980 which falsely stated that he was then bringing $1,972,000 in U.S. currency into the United States. With respect to appellee's conduct, the overt acts alleged in the three counts are identical.

The district court properly determined that the multiplicity issue is governed by *United States v. Albernaz*, 450 U.S. 333 (1981),[3] and *United States v. Marrale*, 695 F.2d 658 (2d Cir.), *cert. denied*, 460 U.S. 1041 (1983). *Albernaz* and *Marrale* establish a three-step inquiry to determine whether Congress intended to authorize multiple punishments for conduct that violates two statutory provisions. 1) If the offenses charged are set forth in different statutes or in distinct sections of a statute, and each section unambiguously authorizes punishment for a violation of its terms, it is ordinarily to be inferred that Congress intended to authorize punishment under each provision. 2) It must next be determined whether the two offenses are sufficiently distinguishable from one another that the inference that Congress intended to authorize multiple punishments is a reasonable one. The *Blockburger* test is employed in making this determination.[4] Under *Blockburger v. United States*, 284 U.S. 299 (1932):

The applicable rule is that where the same act or

[3] *Albernaz* held that a single conspiracy may support consecutive sentences under 21 U.S.C. §§ 846 and 963.

[4] But see note 6 *infra*.

> transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

*Id.* at 304. 3) If *Blockburger* is satisfied, the final step is to test the tentative conclusion that multiple punishments are authorized against the legislative history of the statutory provisions to discover whether a contrary Congressional intention is disclosed. If the legislative history either reveals an intent to authorize cumulation of punishments or is silent on the subject, the court should conclude that Congress intended to authorize multiple punishments. *Marrale,* 695 F.2d at 662; *see also Albernaz,* 450 U.S. at 336-42.

The district court held in light of *Albernaz,* and appellee concedes, that the first two counts present no multiplicity problems as to each other. The district court also determined that each conspiracy statute (21 U.S.C. § 846, 21 U.S.C. § 963 and 18 U.S.C. § 371) unambiguously authorizes punishment for its violation.[5] The district court further determined that Count Three charges a separate offense from Counts One and Two under the *Blockburger* test. But the district court went on to say that use of the *Blockburger* test is only the initial inquiry in determining whether specific and general conspiracy statutes are suffi-

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[5]The maximum penalties for the three conspiracy charges, at the time of appellant's alleged criminal activity, were as follows:

Count One, five years and $15,000 fine under 21 U.S.C. §§ 960(b)(2) and 963;

Count Two, fifteen years and $125,000 fine under 21 U.S.C. §§ 841(b)(6) and 846; and

Count Three, five years and $10,000 fine under 18 U.S.C. §§ 1001 and 371.

ciently distinguishable from one another to infer a Congressional authorization of multiple punishments under step two of the *Marrale* test. Judge Stanton concluded that a court must also look to the "specific allegations and objectives of each conspiracy alleged" and to the "overlap of participants, overt acts, location, time and objectives." Utilizing this approach, the district court found Count Three's general conspiracy allegations multiplicitous when combined with the specific conspiracy allegations of Counts One and Two. The district court ordered the Government to drop Counts One and Two or Count Three. We reverse.

## *DISCUSSION*

An indictment is multiplicitous when a single offense is alleged in more than one count. *United States v. Israelski*, 597 F.2d 22, 24 (2d Cir. 1979). The multiplicity doctrine is based upon the double jeopardy clause of the Fifth Amendment, which "assur[es] that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1971). Moreover, as *Albernaz* makes clear: "[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution." *Albernaz*, 450 U.S. at 344. *See also Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983).

There is no authority in either *Albernaz* or *Marrale* for using *Blockburger* as an *initial* test in determining whether two offenses are sufficiently distinguishable from one another to infer a Congressional authorization of

multiple punishments under step two of the *Marrale* formulation. Rather, those two cases make it clear that *Blockburger* is the *only* test to be used. *See Albernaz*, 450 U.S. at 337-39, and *Marrale*, 695 F.2d at 662.[6] Nor is there authority in either case for carving out a "general conspiracy—specific conspiracy" exception. Rather, in *United States v. Barton*, 647 F.2d 224, 234-38 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981), this Circuit found the general conspiracy statute, 18 U.S.C. § 371, and a specific conspiracy statute, 18 U.S.C. 1962(d), to be non-multiplicitous using *Albernaz* principles.

Appellee seeks to distinguish *Barton*, since in that case the Second Circuit went behind the statutes themselves and looked to the factual allegations in the indictment. This is only half true. The *Barton* court considered how the statutes were being applied in the indictment,[7] but did not base its decision on the defendants' alleged particular course of conduct, or on the absence of any "overlap of participants, overt acts, location, time and objectives." Indeed, the court acknowledged "an area of overlap between the substantive offenses underlying the two conspiracy charges." *Id.* at 237. Further, in *United States v. Thomas*, 757 F.2d 1359, 1369-71 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 66, 67 (1985), and 107 S. Ct. 78 (1986),

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[6]Indeed, where a legislature clearly authorizes cumulative punishment under two statutes, regardless of whether the statutes proscribe the "same" conduct under *Blockburger*, cumulative punishments can be imposed under those statutes in a single trial. *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983).

[7]It is not clear whether courts even have the authority to do this under *Blockburger*. *See Whalen v. United States*, 445 U.S. 684, 694 n.8 (1980); *Whalen*, 445 U.S. at 710-12 and nn.5 & 6 (Rehnquist, J., dissenting); *see also Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975); *but cf. United States v. Thomas*, 757 F.2d 1359, 1372-76 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 66, 67 (1985) and 107 S. Ct. 78 (1986) (Newman, J., concurring in part and dissenting in part).

this court, relying on *Barton* and applying the analysis set forth in *Albernaz* and *Marrale*, found two specific conspiracy statutes, 18 U.S.C. § 1962(d) and 21 U.S.C. § 846, to be non-multiplicitous without looking behind the statutory provisions themselves. *See also United States v. Bradley*, 812 F.2d 774, 780 (2d Cir. 1987); *United States v. Biasucci*, 786 F.2d 504, 516 (2d Cir.), *cert. denied*, 107 S. Ct. 104 (1986); *United States v. Mitchell*, 777 F.2d 248, 264 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1493, 2921 (1986); and *United States v. Langella*, 776 F.2d 1078, 1081-83 (2d Cir. 1985), *cert. denied*, 106 S. Ct 1207 (1986).[8]

In the instant case, the *Blockburger* test is satisfied whether the statutes are looked at in the abstract or as applied in the indictment. 21 U.S.C. §§ 846 and 963 require respectively proof of conspiracies to violate Subchapters I and II of Chapter 13 of Title 21. 18 U.S.C. § 371 can be violated without such proof, since it only requires a conspiracy to commit any offense against the United States or to defraud the United States. In addition, 18 U.S.C. § 371 requires proof of an overt act, something which does not have to be shown under 21 U.S.C. §§ 846 and 963.

Turning to the indictment, Counts One and Two require proof of a conspiracy to import hashish into the United States and of a conspiracy to distribute hashish (or

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[8]Nor does the attempt to create a "general conspiracy-specific conspiracy" exception avail, especially in the context of this case. The relationship between a conspiracy to import hashish and a conspiracy to distribute hashish seems much closer than the relationship between both drug conspiracies and a conspiracy to defraud the United States by filing a false document. If the first two counts are not multiplicitous as to each other, as appellant must concede under *Albernaz*, then it is difficult to argue that they are multiplicitous with respect to the third count.

possess hashish with intent to distribute). Count Three requires no such proof. Count Three requires proof of a conspiracy to defraud a United States agency by impeding the collection of currency information and to make false statements concerning matters within the jurisdiction of a United States department or agency. Counts One and Two require no such proof. *Blockburger* is satisfied.

Nothing in the legislative history of the relevant conspiracy provisions[9] rebuts the presumption that multiple punishments are authorized. *See generally* H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947), *reprinted in* 5 Legislative History Tit. 18 at 2434, 2475-76 (1948); H.R. Rep. No. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4566; 116 Cong. Rec. 33296-33319, 33603-33667, 35050, 35051-35086, 35475, 35477-35490, 35494-35497, 35506-35511, 35516-35523, 35523-35539, 35549-35559 (1970). *See also Albernaz*, 450 U.S. at 341 n.1. Indeed, the very existence of specific conspiracy statutes may evince a legislative intent to authorize multiple punishments, since it indicates some legislative dissatisfaction with the punishment provided for in 18 U.S.C. § 371.[10] In *United States v. Thomas*, 757 F.2d at 1370-71, we noted that 21 U.S.C. § 846 was "intended to enhance the penalties for violation of the general conspiracy provision found in 18 U.S.C. § 371." The same can be said for 21 U.S.C. § 963, since the only difference between section 963 and section 846 is that the latter provision reaches conspiracies to commit offenses

[9]The district court did not consider legislative history, in view of its conclusion that the Government's position did not survive step two of the *Albernaz/Marrale* test.

[10]The legislative history underlying section 371 shows that the 80th Congress retained specific conspiracy offenses in Title 18 where, *inter alia*, the punishment provided in section 371 was not deemed commensurate with the gravity of the offense. *See* 5 Legislative History Tit. 18 at 2476.

defined in Subchapter I of Chapter 13 of Title 21, while the former provision reaches conspiracies to commit offenses defined in Subchapter II thereof.

The conclusion we reach today was also reached by the Tenth Circuit in *Timberlake v. United States*, 767 F.2d 1479 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 883 (1986). Most of the cases relied on by appellee involved successive conspiracy prosecutions under the same statute. Appellee considers this a distinction without a difference, but this view is obviously mistaken, since the issue in multiplicity cases is the unauthorized imposition of multiple punishments for the same conduct, and Congress obviates any multiplicity problems by creating different offenses which prescribe multiple punishments. *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983).[11] *United States v. Corral*, 578 F.2d 570 (5th Cir. 1978), and *United States v. Mori*, 444 F.2d 240 (5th Cir.), *cert. denied*, 404 U.S. 913 (1971), which support appellee's position, were decided prior to *Albernaz*, are directly contrary to *Barton*, and may no longer be good law in the Fifth Circuit. *See United States v. Mitchell*, 777 F.2d 248, 264 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1493, 2921 (1986).

*Conclusion*

The order of the district court is reversed and the case is remanded for further proceedings consistent herewith.

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[11]Appellee also contends that *Braverman v. United States*, 317 U.S. 49 (1942), compels affirmance here. In *Braverman*, however, only the violation of the general conspiracy statute (a predecessor of 18 U.S.C. § 371) was charged. *Albernaz* makes clear that when multiple conspiracy statutes are violated, charges may be brought, and punishments imposed, under each.

## APPENDIX B

UNITED STATES of America

v.

Raffi NAKASHIAN, a/k/a
"Ralfi," Defendant

No. 85 Cr. 997 (LLS).

United States District Court,
S.D. New York.

May 28, 1986.

Rudolph W. Giuliani, U.S. Atty. for the S.D.N.Y., New York City, for U.S. of America; Jess T. Fardella, Asst. U.S. Atty., of counsel.

Wender, Murase & White, New York City for defendant; Kenneth V. Handal, of counsel.

STANTON, District Judge.

Defendant Raffi Nakashian was indicted in five counts on October 30, 1985 for conspiring to import hashish in violation of 21 U.S.C. § 963, to distribute hashish in violation of 21 U.S.C. § 846, and to defraud the United States by making false statements regarding amounts of currency being brought into the country in violation of 18 U.S.C. § 371; and for making false and fraudulent statements to government agents regarding his participation in the alleged conspiracies in violation of 18 U.S.C. § 1001. A superseding indictment was filed on February 26, 1986, dropping the counts for making false statements to government agents and adding four counts of perjury in violation of 18 U.S.C. § 1623. Defendant moves pursuant to (a) Fed.R.Crim.P. 12 for an order

dismissing the indictment for prosecutorial misconduct or, in the alternative, dismissing the conspiracy counts for multiplicity; (b) Fed.R.Crim.P. 6(e)(3)(C)(ii) for an order directing the government to produce for defendant's inspection the minutes of the grand jury proceedings containing the colloquies between the prosecutor and the grand jury; (c) Fed.R.Crim.P. 16 and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), for discovery; and (d) Fed.R.Crim.P. 7(f) for a bill of particulars.

Motion to Dismiss the Indictment

A. Prosecutorial Misconduct

The parties agree on the basic sequence of events which preceded the defendant's indictment. On July 3, 1985

two government agents personally served on the defendant at his auto parts store a grand jury subpoena duces tecum with a return date of July 9, 1985. (Aff. of Raffi Nakashian, ¶¶ 5,6; Aff. of Jess T. Fardella, ¶ 4.) Appended to the subpoena was an "advice of rights," which informed the defendant that he could refuse to answer any question which might incriminate him, that anything he did say might be used against him, and that his attorney, if any, could remain outside the grand jury room for consultation during his examination. (Fardella Aff., Exh. A.) After receiving the subpoena the defendant agreed to be driven by the agents to the office of Assistant United States Attorney Jess T. Fardella (the "AUSA") to discuss the investigation. (Nakashian Aff., ¶ 7; Fardella Aff.,

¶ 4.) At his office the AUSA explained that the government was investigating currency transactions at the Republic National Bank and their possible connection with illegal drug dealing. (Nakashian Aff., ¶ 8; Fardella Aff., ¶ 5.)

On July 9, 1985 the defendant appeared before the grand jury pursuant to the subpoena. (Nakashian Aff., ¶¶ 11, 12; Fardella Aff., ¶ 7.) The AUSA outlined to him the nature of the proceedings and the subject matter of the government's investigation, and informed the defendant that he was a subject of the investigation and could be named as a defendant. (Tr. I at 2-3.)[1] The

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[1] References to the transcripts of defendant's grand jury testimony are designated as to session by roman numeral: July 9, 1985 (I); July 11,

(footnote continued)

defendant was informed of his Fifth Amendment rights and was warned that if he lied under oath to the grand jury he could be charged with a crime. (Tr. I at 3-6.) At the end of the first session the defendant was directed to return two days later to continue his examination. (Tr. I at 56.)

The defendant appeared before the grand jury again on July 11, 1985. During that session the AUSA did not repeat his previous warning that the defendant was a subject of the investigation, nor did he again inform the defendant of his Fifth Amendment rights. The defendant was reminded that

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(footnote continued from previous page) 1985 (II); October 23, 1985, morning session (III); and October 23, 1985, afternoon session (IV); and by page number, preceded by "Tr."

if he lied to the grand jury he could be prosecuted for perjury. (Tr. II at 41-43.)

On August 22, 1985 the government requested that the defendant meet with the AUSA. He agreed and was driven to the AUSA's office by a government agent. (Nakashian Aff., ¶ 18; Fardella Aff., ¶ 10.) They discussed the government investigation, and sometime during their meeting the AUSA urged the defendant to retain an attorney. (Nakashian Aff., ¶ 20; Fardella Aff., ¶ 10.)

On October 16, 1985 a government agent delivered a letter from the AUSA to the defendant which invited him, but did not require him, to appear before a grand jury on October 21, 1985. Subsequently the AUSA agreed to have the defendant appear on October 23, 1985. (Nakashian

Aff., ¶¶ 22, 23 and Exh. A; Fardella Aff., ¶ 11.)

The defendant appeared before a second grand jury on October 23, 1985 after a conversation with the AUSA in his office. (Nakashian Aff., ¶ 26; Fardella Aff., ¶ 13.) During the grand jury examination the AUSA again described the subject matter of the government investigation (Tr. III at 2-4), and the defendant was again informed of his Fifth Amendment rights (Tr. III at 6-9, 38, 77-79, 117; Tr. IV at 3), and told that if he lied under oath he was subject to prosecution for perjury (Tr. III at 8-9; Tr. IV at 82-84). In addition the defendant was forcefully warned at the beginning of the morning session that he was a target of the government investigation and would likely be

indicted by the grand jury. (Tr. III at 4-6.) The defendant's original indictment was handed down on October 30, 1985.

The defendant argues that prosecutorial misconduct which led to his indictment requires its dismissal. The misconduct alleged includes: (1) the AUSA's failure properly to inform the defendant of his Fifth Amendment rights, of his right to refuse to attend or answer any questions before the grand jury when he was attending voluntarily, and of his status as a target of the government investigation, especially in view of the defendant's difficulty with the English language; (2) efforts by the AUSA and government agents to persuade the defendant that he was merely helping with the investigation and that he was

not in danger of prosecution;
(3) badgering of the defendant during his grand jury examination by the AUSA; and
(4) improper use of the defendant's appearance before a second grand jury for no other purpose but the government's discovery.

The Fifth Amendment privilege against compelled self-incrimination protects grand jury witnesses from being forced to give testimony which later may be used against them in a criminal proceeding. Lefkowitz v. Cunningham, 431 U.S. 801, 804-805, 97 S.Ct. 2132, 2135, 53 L.Ed.2d 1 (1977). There is no constitutional requirement, however, that a grand jury witness be specifically informed of his Fifth Amendment rights before his examination in order that his testimony may be used to support a criminal

indictment. United States v. Washington, 431 U.S. 181, 187-188, 97 S.Ct. 1814, 1818-1819, 52 L.Ed.2d 238 (1977); Moynahan v. Manson, 419 F.Supp. 1139, 1150 (D.Conn.1976), aff'd mem., 559 F.2d 1204 (2d Cir.), cert. denied, 434 U.S. 939, 98 S.Ct. 430, 54 L.Ed.2d 299 (1977). Nor is there any constitutional requirement that a target of an investigation be informed of his status before he testifies before a grand jury. Washington, 431 U.S. at 188-89, 97 S.Ct. at 1819; United States v. D'Auria, 672 F.2d 1085, 1093 (2d Cir.1982); United States v. Horowitz, 452 F.Supp. 415, 420 (S.D.N.Y.1978).

It is true, as defendant points out, that in United States v. Jacobs, 547 F.2d 772 (2d Cir.1976), cert. granted, 431 U.S. 937, 97 S.Ct. 2647, 53 L.Ed.2d 254

(1977), cert. dismissed as improvidently granted, 436 U.S. 31, 98 S.Ct. 1873, 56 L.Ed.2d 53 (1978), the court affirmed the suppression of a defendant's grand jury testimony because she had not received a target warning before testifying. However, in that case the Second Circuit merely held, in the exercise of its supervisory power, that in the interest of uniform justice the Organized Crime Strike Force, when investigating crimes within the circuit, should be obliged to follow the long-standing procedure of the United States Attorneys in the circuit pursuant to which a target of an investigation was customarily informed of that status before testifying before a grand jury. The court's ruling was not grounded on any constitutional right to a target warning. Jacobs, 547 F.2d at

775-776. Indeed, the court sought only to enforce a consistent procedure and noted that a uniform practice of omitting target warnings would be equally acceptable. Id. at 778; see also United States v. DePalma, 461 F.Supp. 778, 792-793 (S.D.N.Y.1978).

The defendant further argues that the AUSA's failure to warn the defendant before his July, 1985 grand jury appearance that he was a target of the investigation justifies dismissal of the indictment, since the United States Attorneys' Manual ("USAM") requires such a warning.[2] See USAM, § 9-11.260 at 38. Even assuming that the defendant

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[2] The USAM defines a "target" as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." USAM, § 9-11.260 at 38.

qualified as a target of the grand jury's investigation in July, the provisions of the USAM afford a party no substantive rights, and their violation does not support the dismissal of an indictment. United States v. Catino, 735 F.2d 718, 725 (2d Cir.), cert. denied, __ U.S. __, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984); United States v. Loften, 518 F.Supp. 839, 857 (S.D.N.Y.1981).

In any event, the defendant was repeatedly informed of the subject matter and nature of the grand jury's proceedings, his Fifth Amendment rights, his right to refuse to attend or answer questions when he was before the grand jury voluntarily, and his status as a subject,[3] and later as a target, of the

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[3] The USAM defines a "subject" as "a person whose conduct is within the scope

(footnote continued)

investigation. Considering that the defendant has been living in the United States for the last twelve years (Tr. I at 10; Tr. II at 51), that he studied biology and economics for four years at an American college (Tr. I at 10-11; Tr. III at 31), that he worked at three auto parts stores in this country in the space of three years and has operated his own such store here for the last two years (Tr. I at 9, Tr. III at 35-36), that he fielded almost eight hours of questioning by the AUSA before the grand jury with little or no indication that he failed to understand the proceedings or questions, and that the defendant agreed that he speaks English perfectly well (Tr. II at 28; Tr. III at 2, 13), the defendant's

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(footnote continued from previous page)
of the grand jury's investigation."
USAM, § 9-11.260 at 38.

claim that he did not understand the AUSA's repeated warnings and explanations during his examination is not credible. Cf. United States v. Satterfield, 644 F.2d 1092, 1097 (5th Cir.1981) (finding comprehension of Miranda warnings and intelligent waiver of Fifth Amendment rights where defendant had an 11th grade education and operated his own business); United States v. Yong Bing-Gong, 594 F.Supp. 248, 257 (N.D.N.Y.1984) (same, where Asian defendant had no difficulty responding to police questioning and did not ask for an interpreter).

The defendant's claim that the prosecution improperly misled him during the investigation fails on similar grounds. The defendant states that the government agents and the AUSA were always extremely pleasant to him and

indicated that he was "on the same side" as the government, thus giving him the impression that he was helping them by agreeing to testify and that he was in no danger of being indicted. (Nakashian Aff., ¶¶ 6-9, 14, 16, 17, 20-22, 31.) The AUSA disputes many of the defendant's descriptions of the events which led to his indictment. (Fardella Aff., ¶¶ 4-6, 10-13.) However, even accepting defendant's allegations as true, neither the AUSA nor the government agents involved engaged in misconduct. In essence the defendant's claim is that he was not properly informed of his status as a putative defendant, and thus he was lulled into a false sense of security. As noted above, the defendant had no right to a target warning during the investigation. Further, it can hardly be

said that the agents' alleged acts of courtesy and equivocal expressions of reassurance to the defendant amount to the sort of "truly extreme" official misconduct which justifies the dismissal of an indictment. See United States v. Thibadeau, 671 F.2d 75, 78 (2d Cir.1982); United States v. Broward, 594 F.2d 345, 351 (2d Cir.), cert. denied, 442 U.S. 941, 99 S.Ct. 2882, 61 L.Ed.2d 310 (1979); cf. United States v. Hogan, 712 F.2d 757, 762 (2d Cir.1983) (dismissing indictment because of government's "flagrant and unconscionable" misconduct before grand jury).

The defendant complains that the AUSA repeatedly asked him about a man named Sami Skaff and generally intimidated him before the grand jury. There is no indication in the record that the

defendant was intimidated by the AUSA's examination. (See Tr. IV at 36-37 ("Could you please just answer the question."); Tr. IV at 67 ("Mr. Nakashian, come on. Isn't it a fact that ...?").) The AUSA asked the defendant about Mr. Skaff only four times during the almost eight hours of his testimony. (Tr. II at 30; Tr. III at 63; Tr. IV at 12-16, 36-37.) "An Indictment will be dismissed because of the actions of the prosecution only if there is a clear showing of serious misconduct." United States v. Greater Syracuse Board of Realtors, Inc., 449 F.Supp. 887, 900 (N.D.N.Y.1978); see also United States v. Sugar, 606 F.Supp. 1134, 1146 (S.D.N.Y.1985). The defendant has failed to show that any part of the AUSA's presentation before the grand jury was

intended "to inflame or otherwise improperly influence the jurors against" the defendant. United States v. DiGrazia, 213 F.Supp. 232, 235 (N.D.Ill.1963).

Finally, defendant argues that it was improper for the government to invite him to appear before a second grand jury because that appearance was being used by the AUSA for discovery. That argument is refuted by United States v. Lovasco, 431 U.S. 783, 790-797, 97 S.Ct. 2044, 2048-2052, 52 L.Ed.2d 752 (1977), in which the Court held that there is no constitutional requirement that a defendant be indicted promptly upon the government's obtaining sufficient evidence to do so, when its investigation of the entire criminal transaction is not complete. See also United States v.

Snyder, 668 F.2d 686, 689-690 (2d Cir.), cert. denied, 458 U.S. 1111, 102 S.Ct. 3494, 73 L.Ed.2d 1373 (1982); United States v. Gregory, 611 F.Supp. 1033, 1041 (S.D.N.Y.1985).

The defendant has failed to show prosecutorial misconduct with respect to his indictment, and his motion to dismiss the indictment on that ground is denied.

B. Multiplicity of the Conspiracy Counts

The defendant moves for dismissal of the three conspiracy counts because of their asserted multiplicity. Count One of the indictment charges the defendant with conspiring to violate 21 U.S.C. §§ 812, 952(a) and 960(b)(2), which forbid the importation of narcotic drugs, in violation of the specific companion conspiracy statute, 21 U.S.C. § 963.

Count Two charges the defendant with conspiring to violate 21 U.S.C. §§ 841(a)(1) and 841(b)(6), which forbid the manufacture, distribution or dispensing, or the possession with intent to manufacture, distribute or dispense, of controlled substances, in violation of the specific companion conspiracy statute, 21 U.S.C. § 846. Count Three charges the defendant with conspiring to violate 18 U.S.C. § 1001, which forbids the making of false or fraudulent statements to agencies of the United States, in violation of the general conspiracy statute, 18 U.S.C. § 371. Section 371 provides, in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof

> in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

An indictment is multiplicitous when a single offense is charged in more than one count. United States v. Israelski, 597 F.2d 22, 24 (2d Cir.1979). The multiplicity doctrine is based upon the double jeopardy clause of the Fifth Amendment which "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The vice in multiplicity of charges is two-fold: "it may lead to multiple sentences for the same offense and may improperly prejudice

a jury by suggesting that a defendant has committed not one but several crimes." United States v. Reed, 639 F.2d 896, 904 (2d Cir. 1981); see also United States v. Frederick, 551 F.Supp. 1035, 1042 (D. Kan.1982). The danger to a defendant of receiving multiple punishments for a single offense because of a multiplicitous indictment may be avoided by post-conviction motion or on appeal. Reed, 639 F.2d at 904 n. 6; see, e.g., United States v. Peacock, 761 F.2d 1313, 1319-1320 (9th Cir.), cert. denied, __ U.S. __, 106 S.Ct. 139, 88 L.Ed.2d 114 (1985); United States v. Bradsby, 628 F.2d 901, 905 (5th Cir.1980); United States v. Corral, 578 F.2d 570, 572 (5th Cir.1978); United States v. Clevenger, 458 F.Supp. 354, 359 (E.D. Tenn.1978). However, to avoid the potential prejudice

created by a prolix indictment, the multiplicity issue should be addressed before trial. Upon a finding that the indictment is multiplicitous, the appropriate remedy is to require the prosecution to elect among the multiplicitous counts, with all but the one elected dismissed. Reed, 639 F.2d at 904 n. 6.; see United States v. Austin, 99 F.R.D. 292, 298 (W.D.Mich.1983); United States v. Pray, 452 F.Supp. 788, 800 (M.D.Pa.1978); cf. United States v. Kearney, 451 F.Supp. 33, 38 (S.D.N.Y.1978) (requiring election of one charge from duplicitous count).

In this case, as the defendant concedes, there is no multiplicity issue raised as to the first two counts charged under the specific drug conspiracy statutes. In Albernaz v. United States,

450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), the Court held that there was no double jeopardy violation in imposing consecutive sentences on a defendant convicted of conspiracy to import drugs under 21 U.S.C. § 963, and of conspiracy to distribute drugs under 21 U.S.C. § 846. Id. at 339, 101 S.Ct. at 1142. Defendant claims it is the addition of Count Three under the general conspiracy statute which makes the indictment multiplicitous.

Multiplicity is determined by a three-step inquiry: (1) whether each statutory provision allegedly violated unambiguously authorizes punishment for a violation of its terms; (2) whether the offenses charged are sufficiently distinguishable from one another to permit a reasonable inference that

Congress intended to authorize multiple punishments; and (3) if the first two questions are answered affirmatively, whether the legislative history reveals a Congressional intention against multiple punishments; in the absence of such an expressed intention, the court is to assume that Congress intended to authorize multiple punishments under the statutes charged. Albernaz, 450 U.S. at 336-342, 101 S.Ct. at 1140-1144; United States v. Marrale, 695 F.2d 658, 662 (2d Cir.1982), cert. denied, 460 U.S. 1041, 103 S.Ct. 1434, 1435, 75 L.Ed.2d 793 (1983).

Each conspiracy statute charged against the defendant unambiguously authorizes punishment for its violation. The two drug conspiracy statutes adopt the punishments provided for the

commission of the relevant underlying substantive offenses. 21 U.S.C. § 846; 21 U.S.C. § 963. The general conspiracy statute itself authorizes punishment for felony conspiracies, and adopts the punishment provided for the underlying offense for misdemeanor conspiracies, 18 U.S.C. § 371.[4]

Next it must be considered whether the offenses charged are sufficiently distinguishable that it may be reasonably inferred that Congress intended to permit punishment for each charge. Marrale, 695

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[4] The maximum penalties provided by the applicable statutes for the three conspiracy offenses are: Count One, conspiracy to import hashish: 5 years, $15,000 fine, 21 U.S.C. § 960(b)(2); Count Two, conspiracy to distribute hashish: 15 years, $125,000 fine, 21 U.S.C. § 841(b)(6); Count Three, conspiracy to defraud and make false statements: 5 years, $10,000 fine, 18 U.S.C. § 371, subject to the alternative fine provisions of 18 U.S.C. § 3623.

F.2d at 662. Initially the test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), should be applied to the statutes charged:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. at 304, 52 S.Ct. at 182. Blockburger established a rule of statutory construction whose underlying assumption "is that Congress ordinarily does not intend to punish the same offense under two different statutes." Whalen v. United States, 445 U.S. 684, 691-692, 100

S.Ct. 1432, 1437-1438, 63 L.Ed.2d 715 (1980).

The essence of a conspiracy is the agreement between two or more persons to commit a crime. United States v. Cole, 755 F.2d 748, 755 (11th Cir.1985); United States v. Martino, 664 F.2d 860, 876 (2d Cir.1981); cert. denied, 458 U.S. 1110, 102 S.Ct. 3493, 73 L.Ed.2d 1373 (1982); United States v. Guillette, 547 F.2d 743, 751 (2d Cir.1976), cert. denied, 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102 (1977). The drug conspiracy statutes and the general conspiracy statute are similar to the extent that each requires proof of a defendant's intention to agree and of his intention to effectuate the illegal object of the conspiracy for his conviction. United States v. United States Gypsum Co., 438 U.S. 422, 443 n.

20, 98 S.Ct. 2864, 2876 n. 20, 57 L.Ed.2d 854 (1978); United States v. Kiriki, 756 F.2d 1449, 1453 (9th Cir.1985). However, § 371 requires, in addition, proof of an overt act by a member of the conspiracy in furtherance of the agreement, United States v. Plotke, 725 F.2d 1303, 1307 (11th Cir.), cert. denied, __ U.S. __, 105 S.Ct. 151, 83 L.Ed.2d 89 (1984), an element of proof not required under the drug conspiracy statutes. United States v. Grammatikos, 633 F.2d 1013, 1023 (2d Cir.1980). The drug conspiracy statutes are distinct, since they require proof of an agreement to violate the specific underlying drug offenses, while a conviction under the general conspiracy statute may be based on an agreement to violate any substantive federal criminal statute.

Since the pair of drug conspiracy statutes and the general conspiracy statute charged here each require proof of a fact which the other does not, it would appear under the Blockburger test that Count Three charges a separate offense from the first two counts of the indictment. However, in determining the merits of multiplicity claims arising in the context of multiple conspiracy counts, a court must look beyond the statutory elements to the specific allegations and objectives of each conspiracy alleged. The overlap of participants, overt acts, location, time and objectives are among the relevant factors in deciding whether an indictment charges one or more conspiracy offenses. See United States v. Korfant, 771 F.2d 660, 662 (2d Cir.1985); United States v.

Thomas, 759 F.2d 659, 661-662 (8th Cir.1985); United States v. Abbamonte, 759 F.2d 1065, 1068 (2d Cir.1985). Particularly when an indictment charges violations of the general and a specific conspiracy statute, an analysis of the factual allegations and particular objectives of the conspiracies alleged is essential in determining the issue of multiplicity. See United States v. Thomas, 757 F.2d 1359, 1372-1374 (2d Cir.1985) (Newman, J., dissenting); Corral, 578 F.2d at 572 (impermissible to fragment single conspiracy into separate counts under general and specific conspiracy provisions); United States v. Mori, 444 F.2d 240, 242-245 (5th Cir.), cert. denied, 404 U.S. 913, 92 S.Ct. 238, 30 L.Ed.2d 187 (1971) (same).

The Court in United States v. Barton,

647 F.2d 224 (2d Cir.), cert. denied, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981), looked beyond the elements of the conspiracy statutes to the specific charges in the indictment in ruling on the defendants' challenge to the imposition of cumulative sentences for their violations of the RICO conspiracy statute, 18 U.S.C. § 1962(d), and of the general conspiracy statute, 18 U.S.C. § 371. The defendants were charged under § 371 with agreeing to make and possess explosive devices and maliciously to damage buildings, and under § 1962(d) with agreeing to commit murder and arson. Because much of the evidence underlying the RICO conspiracy charge was unrelated to the § 371 conspiracy, and because the conspiracies had different objectives, the court was "convinced that § 371 and

§ 1962(d) created--and Counts One and Thirteen charged--two separate offenses." Id. at 237; see also Thomas, 757 F.2d 1359 (cumulative punishments for violation of RICO and drug conspiracy laws approved where each statute specifically proscribes, and each conspiratorial agreement sought to achieve, a different illegal objective).

Analysis of the allegations in this case compels the conclusion that the indictment is multiplicitous. The government concedes that the defendant's sole connection to the alleged conspiracies to import and distribute hashish was as a money courier. The defendant allegedly filed Reports of International Transportation of Currency and Monetary Instruments with the United States Customs Service which overstated

the amount of United States currency he was bringing into the country. That scheme allegedly allowed the defendant and others to disguise the fact that the cash they deposited at the Republic National Bank was, in part, proceeds from sales of hashish in the United States. (Fardella Aff., ¶ 2.) The same factual allegations underlie the conspiracy count under § 371. Except for two transactions unrelated to the defendant alleged in the two drug conspiracy counts, the overt acts in the three counts are identical.

While it is true, as a general matter, that a defendant's single course of conduct properly may give rise to liability for distinct conspiracy offenses without violating the double jeopardy clause, Albernaz, 450 U.S. at 343, 101 S.Ct. at 1144, when specific and

general conspiracy offenses are charged based upon a single course of conduct, and where the ultimate criminal object of the alleged conspiracies is the same, then the indictment is multiplicitous and one conspiracy count must be dismissed. See Peacock, 761 F.2d at 1319 (two conspiracy counts multiplicitous where parties, time period, location and overt acts alleged in each conspiracy count were identical); United States v. Sindona, 473 F.Supp. 764, 766 (S.D.N.Y.1979) (one conspiracy does not become many because it contemplates the violation of several criminal statutes).

The defendant moves for dismissal of all three conspiracy counts for multiplicity. Blanket dismissal is unnecessary, however, since elimination of either the two drug conspiracy counts

or of the general conspiracy count would eliminate the multiplicity of the indictment. Therefore the government is directed to elect within ten days of the date of this order between the drug conspiracies charged in the first two counts and the general conspiracy charged in Count Three. To preclude the imposition of multiple penalties for a single offense, and to avoid the prejudice likely to result from the inclusion in the indictment of repetitive conspiracy counts, the court will dismiss the count or counts not elected.

Motion for Inspection of Grand Jury Minutes

Defendant moves pursuant to Fed.R.Crim.P. 6(e)(3)(C)(ii) for an order directing the government to permit him to inspect the grand jury minutes of the

prosecutor's colloquies with the grand jury. The Supreme Court "has recognized the 'long-established policy that maintains the secrecy of grand jury proceedings in the federal courts.'" Dennis v. United States, 384 U.S. 855, 869, 86 S.Ct 1840, 1848, 16 L.Ed.2d 973 (1966) (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958)). Rule 6(e)(3)(C)(ii) provides an exception to the general rule of secrecy "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." However, disclosure of grand jury proceedings "is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and ... the burden of demonstrating this balance

rests on the private party seeking disclosure." Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 223, 99 S.Ct. 1667, 1675, 60 L.Ed.2d 156 (1979). The standard is customarily described as requiring a strong showing of "particularized need" on the part of the movant. See, e.g., United States v. Williams, 644 F.2d 950, 952 (2d Cir.1981); United States v. Moten, 582 F.2d 654, 662 (2d Cir.1978); Grumman Aerospace Corp. v. Titanium Metals Corp. of America, 554 F.Supp. 771, 773-774 (E.D.N.Y.1982); United States v. Abrams, 539 F.Supp. 378, 388-389 (S.D.N.Y.1982); Malizia v. United States Dept. of Justice, 519 F.Supp. 338, 345-346 (S.D.N.Y.1981).

The defendant has failed to demonstrate a particularized need

sufficient to justify disclosure of the grand jury minutes he seeks. He argues that because of the prosecutor's asserted misconduct in obtaining the indictment and the multiplicitous form of the indictment, it is likely that the prosecutor improperly instructed the grand jury. (Defendant's Memorandum in Support of Motion to Dismiss at 54.) However, since the court has found no prosecutorial misconduct in the events leading to defendant's indictment, and since the defendant has been granted dismissal of the multiplicitous counts of the indictment, there are no grounds asserted by the defendant, save speculation and conjecture which are insufficient, to justify breaching the secrecy of the grand jury proceedings. See United States v. Beatty, 587 F.Supp.

1325, 1334-1335 (E.D.N.Y.1984) (defendant's suspicion of irregular grand jury proceedings does not justify disclosure).

Discovery

The defendant moves pursuant to Fed.R.Crim.P. 16 and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), for discovery of:

(a) any statements in the government's possession made by the defendant;

(b) any statements in the government's possession made by co-conspirators;

(c) the identities of the government's prospective witnesses and any of their statements in the government's possession;

(d) all grand jury records and testimony;

(e) the identities of any persons who acted as undercover agents or informants in the case, and of any persons known by the government to possess information relevant to the case;

(f) all documents or tangible items, intended by the prosecution to be used as evidence, which were obtained from or belong to the defendant, or which are material to the preparation of the defense, and the results or reports of any scientific tests or experiments, and physical or mental examinations relevant to the case;

(g) memoranda, logs or notes related to wiretapping, eavesdropping or other methods of surveillance used in the investigation of the case;

(h) Brady material, including information regarding agreements made between the government and its prospective witnesses; information bearing on the motivation, credibility, mental or physical disability, drug or alcohol dependence, prior criminal conduct or charges, and false statements of prospective government witnesses; and the "rap" sheets of potential government witnesses; and

(i) "similar act" or "other crime" evidence against the defendant in advance of trial.

A. Defendant's Statements

The government has already produced to defendant copies of his testimony before the grand jury and of handwritten government agents' notes reflecting

defendant's statements to them (Handal Aff., Exh. D. at 1.) The defendant seeks further disclosure of his written statements and records of his oral statements in the government's possession.

Under Fed.R.Crim.P. 16(a)(1)(A) a defendant is entitled to production of "any relevant written or recorded statements made by the defendant," and of the substance of defendant's oral statements which the government intends to offer into evidence and which were made "in response to interrogation by any person then known to the defendant to be a government agent." Defendant is not entitled to discovery of his oral statements to persons other than those he knew at the time to be government agents. See e.g., United States v. Jackson, 757

F.2d 1486, 1491 (4th Cir.), cert. denied, __ U.S. __, 106 S.Ct. 407, 88 L.Ed.2d 358 (1985) (Rule 16(a)(1)(A) does not require disclosure of statements by others to government which recount defendant's statements); United States v. McClure, 734 F.2d 484, 493 (10th Cir.1984) (defendant not entitled to substance of oral statement made to one who was not known by defendant to be a government agent); United States v. Viserto, 596 F.2d 531, 538 (2d Cir.), cert. denied, 444 U.S. 841, 100 S.Ct. 80, 62 L.Ed.2d 52 (1979) (notes of unrecorded conversation overheard by government agent, whose presence was unknown to defendant, are not discoverable under Rule 16(a)(1)(A)); United States v. Nelson, 606 F.Supp. 1378, 1389 (S.D.N.Y.1985) (Rule 16(a)(1)(A) does not

apply to statements of government witnesses which repeat the defendant's statements); United States v. Heldon, 479 F.Supp. 316, 322-323 (E.D.Pa.1979) (Rule 16(a)(1)(A) does not apply to all defendant's statements in government's possession, regardless of to whom they were made). To the extent that the government has not met its obligation under Rule 16(a)(1)(A) to produce copies of the defendant's written and oral statements, it is directed to do so forthwith.

B. Co-Conspirators' Statements

The defendant seeks pre-trial inspection of records, recordings or copies of statements made by his alleged co-conspirators. Generally such statements are not discoverable, except to the extent that they fall within the

requirements of Brady and the Jencks act, 18 U.S.C. § 3500. United States v. Percevault, 490 F.2d 126, 131 (2d Cir.1974); Nelson, 606 F.Supp. at 1389; United States v. Wilson, 565 F.Supp. 1416, 1438 (S.D.N.Y.1983); Greater Syracuse Board, 438 F.Supp. 376 at 383 (N.D.N.Y.1977).

An exception to the general rule has been recognized, however, for statements made during the course of and in furtherance of a conspiracy, if the co-conspirator whose statement is sought is not a prospective government witness and the disclosure of his statement would not unnecessarily reveal sensitive information. See Jackson, 757 F.2d at 1491-1492; United States v. Payden, 613 F.Supp. 800, 820 (S.D.N.Y.1985); United States v. Konefal, 566 F.Supp. 698, 706-

707 (N.D.N.Y.1983); United States v. Thevis, 84 F.R.D. 47, 56-57 (N.D. Ga.1979); United States v. Turkish, 458 F.Supp. 874, 882 (S.D.N.Y.1978), aff'd, 623 F.2d 769 (2d Cir.1980); United States v. Agnello, 367 F.Supp. 444, 448-449 (E.D.N.Y.1973). The theory underlying the exception begins with the fact that Fed.R.Evid. 801(d)(2)(E) makes admissible the statements of a defendant's co-conspirator made during the course and in furtherance of the conspiracy. Thevis, 84 F.R.D. at 56; Agnello, 367 F.Supp. at 448. Since that rule permits the government to introduce such statements of a co-conspirator against the defendant as if they were his own, courts have reasoned that they should be discoverable as the defendant's statements under Fed.R.Crim.P. 16(a)(1)(A), subject to

Fed.R.Crim.P. 16(a)(2), which exempts from pre-trial discovery statements made by prospective government witnesses. See 2 C. Wright, Federal Practice and Procedure § 253 at 50 (2d ed.1982); contra United States v. Thomas, 609 F.Supp. 1048 (E.D.N.C.1985); Nelson, 606 F.Supp. at 1389-1390.

Discovery of a co-conspirator's statement when he will not be called to testify in person for the prosecution avoids unfair surprise to the defendant, since it affords the defendant an opportunity to investigate the origin and truthfulness of the statement before it is offered against him at a trial in which he will be unable to cross-examine the co-conspirator himself. Jackson, 757 F.2d at 1491. In addition such disclosure does not implicate the

policies behind 18 U.S.C. § 3500, which precludes disclosure of government witnesses' statements until after their trial testimony to avoid intimidation of witnesses and efforts to suborn perjury, Percevault, 490 F.2d at 131, since the witnesses' statements are memorialized. Jackson, 757 F.2d at 1491-1492.

Here the government has made no showing that disclosure of statements made by co-conspirators whom it does not intend to call as witnesses, if any, will unnecessarily reveal sensitive information. Therefore the government is directed to provide defendant with copies of any such statements it will offer, made during the course of and in furtherance of the conspiracy by those co-conspirators whom the government does not intend to call as witnesses, but

those statements may be redacted to exclude references irrelevant to the indictment in this case. See Konefal, 566 F.Supp. at 707; cf. United States v. Shoher, 555 F.Supp. 346, 353 (S.D.N.Y.1983) (disclosure of non-witnesses' written statements under Rule 16(a)(1)(C) as documents "intended for use by the government as evidence in chief at the trial" is limited to material information).

C. Government Witnesses' Identities and Statements

In the absence of something more than "an abstract, conclusory claim that [disclosure of prospective government witnesses' identities is] necessary to [the defendant's] proper preparation for trial," he is not entitled to that disclosure. United States v. Cannone,

528 F.2d 296, 301-302 (2d Cir.1975); see also Nelson, 606 F.Supp. at 1389; United States v. Ramirez, 602 F.Supp. 783, 794 (S.D.N.Y.1985); Konefal, 566 F.Supp. at 705; H.R.Conf.Rep.No. 414, 94th Conf., 1st Sess. 12, reprinted in 1975 U.S.Code Cong. & Ad.News 674, 713, 716 ("Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formation of this policy [not to require the disclosure of witness identities]."). Since the defendant has made no particular showing of need for disclosure of the identities of the government's witnesses, his motion for an order compelling that disclosure is denied.

The defendant's motion for production of statements of the government's

prospective witnesses is also denied. Not only does Fed.R.Crim.P. 16(a)(2) specifically exempt such statements from the scope of pre-trial discovery, but in addition, under 18 U.S.C. § 3500, a district court is without jurisdiction to order the disclosure of statements of such witnesses before their direct testimony at trial. United States v. Sebastian, 497 F.2d 1267 (2d Cir.1974); Percevault, 490 F.2d at 132; United States v. Persico, 621 F.Supp. 842, 869 (S.D.N.Y.1985); Wilson, 565 F.Supp. at 1438; Greater Syracuse Board, 438 F.Supp. at 383.

D. Grand Jury Records and Testimony

As with his motion pursuant to Rule 6 for production of the prosecutor's colloquies with the grand jury, defendant is entitled to the grand jury log and

witness testimony only upon a strong showing of "particularized need." Williams, 644 F.2d at 950; Beatty, 587 F.Supp. at 1334; Abrams, 539 F.Supp. at 388-389. The defendant provides no support for his request for the grand jury materials, and his motion for their production is denied.

E. Identities of Non-Witnesses

The defendant seeks production of the names of those who acted as informants or undercover agents in the case, and of any other persons who have, to the government's knowledge, information relevant to the case. As the government recognizes (Government's Memorandum at 67), Brady forbids the suppression of exculpatory evidence by the prosecution. Id., 373 U.S. at 87, 83 S.Ct. at 1196. Brady does not go so far, however, as to

require that a defendant be supplied "with all the evidence in the Government's possession which might conceivably assist the preparation of his defense...." United States v. LeRoy, 687 F.2d 610, 619 (2d Cir. 1982), cert. denied, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983); see also United States v. Bagley, __ U.S. __, 105 S.Ct. 3375, 3380 n. 7, 87 L.Ed.2d 481 (1985) (Brady did not create a broad, constitutionally required right of discovery); United States v. Beasley, 576 F.2d 626, 630 (5th Cir.1978), cert. denied, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979) ("Brady is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation."); United States v. Shakur, 543 F.Supp. 1059, 1061 (S.D.N.Y.1982) ("Brady does

not entitle a defendant to a general right of pre-trial discovery."). The defendant's request for the identities of the government's agents, informants, and persons with relevant information is the sort of "rummaging of the prosecution's files" unauthorized by Brady, and his motion for production of that information is denied. Shakur, 543 F.Supp. at 1061.

F. Documents, Tangible Items and Test Reports

Defendant moves pursuant to Fed.R.Crim.P. 16(a)(1)(C) and (D) for an order compelling production of various documents, objects and reports. Inasmuch as the prosecution has agreed to produce for defendant's inspection all the items in its possession which are subject to discovery under Rules 16(a)(1)(C) and (D) (Handal Aff., Exh. A at 3, Exh. D at 6-7,

Exh. E at 1-3; Government's Memorandum at 63-65), defendant's motion is granted, and the government is directed to produce or permit the defendant to inspect and copy such materials forthwith.

G. Surveillance Materials

Defendant's motion for production of memoranda, logs or notes related to wiretapping, eavesdropping or other surveillance by the government is denied. Such internal government documents developed by the prosecution are specifically exempted from discovery. Fed.R.Crim.P. 16(a)(2); see also United States v. Spagnuolo, 549 F.2d 705, 712-713 (9th Cir.1977); Payden, 613 F.Supp. at 820; United States v. Smith, 405 F.Supp. 144, 145 (E.D.Pa.1975).

H. Brady Materials

Defendant seeks a broad range of

materials relating to the government's prospective witnesses pursuant to Brady. (Defendant's Memorandum in Support of Motion for Discovery at 44-49.) The government generally agrees that the materials requested are discoverable under Brady. (Government's Memorandum at 66 n.*.) As the government points out, however, the defendant is not entitled to disclosure of the identities of all persons with knowledge relevant to the case (see section E, supra), nor is he necessarily entitled to production of the materials sought; the Brady requirements are satisfied when the prosecution directs the defendant to a source of exculpatory evidence available to him. LeRoy, 687 F.2d at 618-619; United States v. Natale, 526 F.2d 1160, 1170-1171 (2d Cir.1975), cert. denied, 425 U.S. 950, 96

S. Ct. 1724, 48 L.Ed.2d 193 (1976).

Defendant also seeks an order requiring immediate production of all Brady material. The prosecution has undertaken to supply Brady material to the defendant "in a manner which is useful to Nakashian and which is timed so as to avoid any delay at trial." (Government's Memorandum at 67.) That undertaking is sufficient to defeat defendant's motion. Brady and its progeny do not require production of exculpatory materials before trial, and the prosecution fulfills its obligations under Brady so long as the defendant is not prejudiced by delay in disclosure. United States v. Holloway, 740 F.2d 1373, 1381 (6th Cir.), cert. denied, __ U.S. __, 105 S.Ct. 440, 83 L.Ed.2d 366 (1984); United States v. McPartlin, 595

F.2d 1321, 1346 (7th Cir.), cert. denied, 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979); United States ex rel. Lucas v. Regan, 503 F.2d 1, 3 n. 1 (2d Cir.1974), cert. denied, 420 U.S. 939, 95 S.Ct. 1149, 43 L.Ed.2d 415 (1975); Payden, 613 F.Supp. at 821 ("The material must be disclosed in time for the effective use of the material at trial.").[5]

In light of the prosecution's acknowledgement of its obligations under Brady, defendant's motion for an order compelling immediate production

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[5] To the extent that exculpatory material under Brady is contained in statements also subject to disclosure at trial pursuant to 18 U.S.C. § 3500, courts have routinely held that the government's compliance with the Jencks act at trial provides timely disclosure under Brady. See e.g., United States v. Campagnuolo, 592 F.2d 852, 859-860 (5th Cir.1979); United States v. Scott, 524 F.2d 465, 467-468 (5th Cir.1975).

of Brady materials is denied.

I. Similar Act Evidence

Defendant's motion for an order compelling disclosure of the government's intention to introduce "similar act" evidence in its case in chief pursuant to Fed.R.Evid. 404(b) is denied. The motion is presumably made pursuant to Fed.R.Crim.P. 12(d)(2), which requires the prosecution, upon defendant's request, to provide to the defendant the evidence which it intends to introduce in its direct case which is discoverable under Fed.R.Crim.P. 16. While a defendant's criminal record is discoverable under Rule 16(a)(1)(B), evidence of a defendant's prior wrongs or similar acts is not. Payden, 613 F.Supp. at 820; United States v. Climatemp, Inc., 482 F.Supp. 376, 391 (N.D.Ill.1979),

aff'd mem., 705 F.2d 461 (7th Cir.), cert. denied, 462 U.S. 1134, 103 S.Ct. 3116, 77 L.Ed.2d 1370 (1983).

Bill of Particulars

The defendant moves pursuant to Fed.R.Crim.P. 7(f) for a bill of particulars setting forth the details of the defendant's alleged participation in transactions in furtherance of the conspiracy. The purpose of a bill of particulars is to supplement the allegations in the indictment when necessary to (1) enable the defendant to prepare his defense, (2) avoid unfair surprise to the defendant at trial, and (3) preclude a second prosecution for the same offense. Wong Tai v. United States, 273 U.S. 77, 82, 47 S.Ct. 300, 302, 71 L.Ed. 545 (1927); United States v.

Salazar, 485 F.2d 1272, 1277 (2d Cir.1973), cert. denied, 415 U.S. 985, 94 S.Ct. 1579, 39 L.Ed.2d 882 (1974). A bill of particulars is not to be used as a general discovery tool for the defense, and one should not be required merely to provide the defendant a pre-trial review of the government's evidence and legal theories. See United States v. Gottlieb, 493 F.2d 987, 994 (2d Cir.1974); Payden, 613 F.Supp. at 816; Nelson, 606 F.Supp. at 1390; Wilson, 565 F.Supp. at 1438-1439; United States v. Shoher, 555 F.Supp. 346, 350 (S.D.N.Y.1983); United States v. Mannino, 480 F.Supp. 1182, 1185 (S.D.N.Y.1979).

In deciding a motion for a bill of particulars the court should determine whether the defendant has been sufficiently appraised, by means of the

indictment, prior proceedings and discovery, "of the essential facts of the crime for which he has been indicted." Salazar, 485 F.2d at 1278; see also Payden, 613 F.Supp. at 816. The indictment in this case provides detailed information concerning three overt acts allegedly engaged in by the defendant, as well as considerable background relating to the alleged conspiracies. In addition, the government has provided through discovery other facts and copies of documents, including the names of the defendant's alleged co-conspirators. (Handal Aff., Exh. A at 1-4; Exh. D; Exh. E.) A defendant charged with conspiracy is not entitled to know before trial "the means by which it is claimed [he] performed

acts in furtherance of the conspiracy," nor may the government be required to disclose the "[d]etails as to how and when the conspiracy was formed, or when each participant entered it." Persico, 621 F.Supp. at 868; see also Payden, 613 F.Supp. at 817; Wilson, 565 F.Supp. at 1438-1439; Shoher, 555 F.Supp. at 350; Agnello, 367 F.Supp. at 450-451.

Together the indictment and the discovery provided by the prosecution give the defendant adequate notice of the charges against him, and his motion for a bill of particulars is denied.

Preservation of Prosecution Materials

Defendant's motion for an order directing the government to preserve until trial any documents, tangible objects, notes or memoranda in its

possession relating to this case is granted without opposition.

So ordered.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of July one thousand nine hundred and eighty-seven.

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UNITED STATES OF AMERICA,
Appellant,

v. No. 86-1310

RAFFI NAKASHIAN, a/k/a "Ralfi,"
Defendant-Appellee.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellee Raffi Nakashian,

Upon consideration by the panel that heard the appeal it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk